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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-550

Travis L. B. Wilson ..... *Petitioner*

Vs.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at *Wilson* v. *State of Arkansas*, 258 Ark. 110, 522 S.W. 2d 413 (May 12, 1975) and is reproduced in petitioner's brief in support.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. WHETHER THE PURPORTED CONFESSION GIVEN BY DEFENDANT TO POLICE IN AMARILLO, TEXAS, MET THE TEST OF VOLUNTARINESS, TAKING INTO CONSIDERATION THE "TOTALITY OF THE CIRCUMSTANCES," INCLUDING DEFENDANT'S PHYSICAL AND MENTAL STATE.

2. WHETHER THE TRIAL COURT FAILED TO TIMELY CONVENE A "DENNO" HEARING TO DETERMINE THE ADMISSIBILITY OF A PURPORTED CONFESSION.

3. WHETHER A PURPORTED CONFESSION TO A CELL MATE MUST BE FOUND TO BE VOLUNTARY AND ADMISSIBLE IN A "DENNO" HEARING PRIOR TO ITS BEING INTRODUCED INTO EVIDENCE BEFORE THE JURY.

4. WHETHER THE STATE'S REFERENCE IN REBUTTAL CLOSING ARGUMENT TO PETITIONER'S ATTORNEY AS "APPOINTED" IS PREJUDICIAL AND DENIAL OF DUE PROCESS OF LAW.

ARGUMENT

The issues in this case have been narrowly drawn and the judicial review has been sufficient to not warrant review by this Court on certiorari. The *Denno* hearing held pursuant to the Arkansas statutory scheme properly heard all of the evidence and testimony constituting the "totality of circumstances" and the finding of admissibility was affirmed on appeal. The issues of the time at which the *Denno* hearing must be held, before or during trial, and the necessity of a *Denno* hearing in the case of an inculpatory statement made to a person without law enforcement authority and not in an informant relationship therewith were also presented and determined adversely to the petitioner upon the basis or prior holdings by the Arkansas Supreme Court and this Court. The case at bar does not raise special or important issues that require review by this Court and petitioner's petition for a writ of certiorari should not be entertained.

I

WHETHER THE PURPORTED CONFESSION GIVEN BY DEFENDANT TO POLICE IN AMARILLO, TEXAS MET THE TEST OF VOLUNTARINESS, TAKING INTO CONSIDERATION THE "TOTALITY OF THE CIRCUMSTANCES," INCLUDING DEFENDANT'S PHYSICAL AND MENTAL STATE.

The petitioner's confession was found to have been freely and voluntarily given by the trial court pursuant to a *Denno* hearing and written findings therefrom which decision predicating admissibility was reviewed and affirmed by the

Arkansas Supreme Court. The findings of both forums were made on the basis of the totality of the circumstances. ***Boulden*** v. ***Holman,*** 394 U.S. 478, 89 S. Ct. 1138, 22 L. Ed. 2d 433 (1969); ***Harris*** v. ***State,*** 244 Ark. 314, 425 S.W. 2d 293 (1968). The hearing upon the voluntariness of the confession was held in accord with ***Jackson*** v. ***Denno,*** 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), and as required by statute, Ark. Stat. Ann. §43-2105 (Supp. 1973).

Petitioner, however, would have this Court review again those determinations alleging they were erroneously rendered with respect to the evidence of defendant's intoxication, lack of sleep, lack of food, and general intellectual condition. The argument, too, alleges that the length of the interrogation resulting in the confession is another factor denying the propriety of admissibility.

Petitioner's claim of involuntariness because of his intoxication induced either by alcohol or drugs was presented to the trial court by controverted evidence. The other participants in the activities immediately preceding the homicide and subsequent flight of the defendant testified that defendant was not drunk that night. Their testimony was controverted only by the defendant's parents, obviously interested parties. Defendant also alleged the consumption of some alcohol which he found in a bus station restroom enroute to Amarillo, Texas. There was no proof adduced to this latter point save defendant's claim.

Considering the testimony in the light most favorable to the defendant the evidence reveals that the defendant arrived at his parent's home at 2:00 to 2:15 A.M. on July 5th, left on the bus out of town at 5:15 A.M. on July 5th, was arrested in Amarillo, Texas at 8:00 A.M. on July 5th, the Arkansas investigating of-

ficers arrived in Amarillo at midnight on July 5th, the waiver of rights form was signed and the questioning of the defendant began at 1:20 A.M. on July 6th. Therefore, save whatever alcohol was allegedly consumed enroute to Amarillo the evidence showed that the defendant had not ingested any intoxicants for the twenty three preceding hours.

The generally accepted proposition concerning the defense of intoxication at a voluntariness hearing is ". . . that intoxication at the time of making a confession will not exclude such from being admitted into evidence; however, such intoxication will go to the weight and credibility of the confession. . . ." ***Fant*** v. ***Peyton,*** 303 F. Supp. 457, 459 (D.C. W.D. Va., 1969). Accord, see, ***United States*** v. ***Harden,*** 480 F. 2d 649 (8th Cir. 1973). Under this standard the confession was properly admitted in evidence by the trial judge.

The defendant's alleged drug induced intoxication, from ". . . a quart of THC . . .," too, was allegedly ingested over twenty four hours before the confession, and was directly controverted by a witness who was present when it was alleged to have been taken. The witness said she saw no evidence of drugs and none were found at the residence of the deceased the following morning by the police. Inferentially, the same standard is applied to allegations of drug induced intoxication as to alcohol induced, as the standard is whether the drug deprived the defendant of "a rational intellect and free will." ***Harden,*** supra, at 650; ***Townsend*** v. ***Sain,*** 373 U.S. 293, 307 (1963).

The alleged lack of food and sleep as elements operating to vitiate the knowing and voluntary character of the confessions given by the defendant were controverted by the spontaneousness and clarity of his answers, and by his ability to recount the same confession almost verbatim three times.

This latter element also carries considerable weight as to the issue of the defendant's alleged diminished intellectual capacity. The appellant did have a tenth grade education and his demonstrated ability to orally express himself and to reconstruct events, which must be considered excellent, operate to nullify his claim based solely upon the evidence of his writing and spelling prowess.

The issue raised by defendant as to the alleged lengthy interrogation was also controverted. The interrogation did not begin at 7:00 P.M. as alleged by the defendant because the interrogating officers did not arrive in Amarillo until midnight and the interrogating officer testified that the total time spent with the defendant was only one and a half hours. He also testified that it took that period of time only because the tape recorder malfunctioned when the defendant repeated his statement the second time.

Other factors that must be considered in the totality of review are that the interrogation did not take place in a police dominated atmosphere as there were no uniformed personnel present, that the Arkansas officers shared their dinner with appellant after the interrogation, and the defendant's own testimony about the cooperative and congenial nature of the interrogating officer.

When the totality of the circumstances is shown, especially as to each of the alleged deficiencies the decision of both the trial court and the Arkansas Supreme Court finding the confession to have been given voluntarily and knowingly were proper and do not warrant review by this Court.

II

WHETHER THE TRIAL COURT FAILED TO TIMELY CONVENE A "DENNO" HEARING TO DETERMINE THE AADMISSIBILITY OF A PURPORTED CONFESSION.

The procedure adopted both in *Jackson* v. *Denno,* 378 U.S. 368 (1964) and by statute in Arkansas, Ark. Stat. Ann. §43-2105 (Supp. 1973) operate in a manner protective of the rights of the defendant and achieve the proper purpose, i.e. making a determination by the trial judge of the voluntary and knowing character of a custodial confession before the presence of same is known to the jury. The procedure is totally compatible with the directive of *Jackson,* supra:

> "It is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence." U.S. at 395.

Respondent has found no cases nor has petitioner referred to any which hold that the *Denno* hearing must be held before the trial commences. In this case, the jury had no inkling that the defendant had confessed to the law enforcement officer until after the trial court had held a hearing in chambers and had held the confession admissible as voluntary. This it seems to respondent is the intent of the Court's decisions and it has been sanctioned as proper by the Arkansas Supreme Court. *Hall* v. *State,* 252 Ark. 201, 412 S.W. 2d 603 (1973); *Sheppard* v. *State,* 239 Ark. 785, 394 S.W. 2d 624 (1965). Further, the procedure utilized provides the most efficient and economical means of expediting the disposition of the issue of the volun-

tariness of the confession; all necessary witnesses, whether from in or out of the State, are present at the trial itself; the State and defendant need to incur the expense of producing witnesses only once; the entire chronology of events is more easily demonstrated and understandable; and, the procedure works in favor of the defendant. As regards the latter elements, the procedure utilized prevents the State from any mention of the defendant's inculpatory statement in opening argument or at any time before its admission in evidence which enhances the defendant's presumption of innocence and prevents the State from making repetitive references to same which may adversely affect the jury's reception of other evidence. In short, the procedure complies with the intent of *Denno,* supra, and there is no resulting prejudice to the defendant.

III

WHETHER A PURPORTED CONFESSION TO A CELLMATE MUST BE FOUND TO BE VOLUNTARY AND ADMISSIBLE IN A "DENNO" HEARING PRIOR TO ITS BEING INTRODUCED IN EVIDENCE BEFORE THE JURY.

The statement of the defendant to a jail mate was not made in a situation demanding a hearing on the voluntariness thereof prior to its admission at trial in the form of testimony.

Jackson v. *Denno,* supra, and its progeny demand a careful scrutiny of custodial interrogations conducted by law enforcement officials and of the methods employed. However, those cases do not require nor should they require the same scrutiny in instances where the defendant makes incriminating statements to private parties without the status of or a

relationship with a law enforcement official.

In this case the defendant reiterated his thrice given confession to a sixteen year old jail mate who was incarcerated before defendant's arrival on charges of public drunkenness and resisting arrest. The testimony showed that the jail mate, Bennie Vance, was not working for the police and that no subterfuge or deception was used by him. There was no interrogation, rather the appellant volunteered the statement. There was no coercion, nor promises of leniency which would vitiate the voluntariness of the statement and the cross-examination of the witness clearly bore this out.

This Court, in outlining the method to be used in determining the voluntariness of a confession and in stating the reasons for such a hearing, stated:

> "It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the 'strongly felt attitude of our society that important human values are sacrificed where ***an agency of the government,*** in the course of securing a conviction, wrings a confession out of an accused against his will,' ***Blackburn*** v. ***Alabama,*** 361 U.S. 199, 206-207, 4 L. Ed. 2d 242, 248, 80 S. Ct. 274, and because of 'the deep-rooted feeling that ***the police*** must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.' ***Spano*** v. ***New York,*** 360 U.S. 315, 320-321, 3 L. Ed. 2d 1265, 1270, 79 S. Ct. 1202." ***Jackson,*** supra, U.S. at 385-. (Our emphasis added.)

In the same case, the Court said:

> "As reflected in the cases in this Court, ***police conduct*** requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will." ***Jackson,*** supra, U.S. at 389. (Our emphasis added.)

In this case, "police conduct" or acts by an "agency of the government" are not in issue, and, therefore, a ***Denno*** hearing is not required. The intent of ***Jackson,*** supra, is further articulated in ***Lego*** v. ***Twomey,*** 404 U.S. 477 (1972) where this Court stated:

> "In 1964, this Court held that a criminal defendant who challenges the voluntariness of a confession ***made to officials*** and sought to be used against him at this trial has a due process right to a reliable determination that the confession was in fact voluntarily given and not the outcome of coercion which the constitution forbids." U.S. at 478.

Therefore, neither ***Jackson,*** supra, nor its progeny require that a hearing be held on the voluntariness of a confession made in the circumstances of this case. There is no allegation of police misconduct or even of involvement by law enforcement officials and the mere fact that the defendant was in jail at the time does not provide sufficient compelling reason for such confessions to be so scrutinized.

However, another important feature of this particulr case is that the confession admitted in evidence through the testimony of the defendant's jail mate was nearly verbatim the same con-

fession made by the defendant to the officers in Amarillo, Texas, which had already been admitted in evidence. The confession in Amarillo, Texas, was given three times to the officers. Further, the physical and testimonial evidence at trial corroborated nearly every fact present in the defendant's many confessions. In short, the evidence of the guilt of the defendant was overwhelming. In such circumstances, this Court has sanctioned a finding of harmless error as to evidence improperly introduced. *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967). A factually analogous case to the present, too, endorses this approach. *Milton* v. *Wainwright*, 407 U.S. 371 (1972). Respondent submits that the testimony of the jail mate was properly elicited at trial without the necessity of subjecting it to the scrutiny of a *Denno* hearing because there was no element of law enforcement official involvement, but, if that procedure is erroneous that it was harmless error. This is not a proper case for this Court's review.

IV

WHETHER THE STATE'S REFERENCE IN REBUTTAL CLOSING ARGUMENT TO PETITIONER'S ATTORNEY AS "APPOINTED" IS PREJUDICIAL AND A DENIAL OF DUE PROCESS OF LAW.

In Arkansas, the granting of a mistrial is an extraordinary remedy that should not be resorted to except in cases where the interests of justice cannot otherwise be met. This is not a situation demanding that remedy. When the comment is seen in its context it is most innocuous and the defendant's umbrage is not justified. The entire statement is as follows, without petitioner's intervention:

> "Ladies and Gentlemen of the jury, when the Court appointed Mr. Ellis to represent this man, he was given a most difficult task."

Respondent fails to see how such a statement reflects upon counsel's competence or upon any alleged difference between appointed and retained counsel that would adversely affect the jury. Respondent fails, also, to see how the statement denies the rights of equal protection or due process to petitioner or how it dilutes *Gideon* v. *Wainwright*, 372 U.S. 335 (1965) and its progeny. The statement would have been equally true had the reference been to retained counsel in the face of the overwhelming evidence against the petitioner. The comment in this case was determined to have been not favored, but neither was it prejudicial. The reasoning of the Arkansas Supreme Court is proper and that reasoning is closely aligned to the decision of this Court in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811, reh. den. 310 U.S. 658, 84 L. Ed. 1421, 60 S. Ct. 1091 (1940), and the factors which precipitated that decision apply in full force to this case. The prosecutor in *Socony-Vacuum*, supra, made repeated references to the wealth of the defendants as a factor to be considered by the jury in determining guilt or innocence much as petitioner claims the prosecutor did herein. This Court there said that although the statements exceeded the bounds of propriety, they did not require a reversal because (1) the record did not show that the jurors' minds would be influenced by such incidental remarks to the extent that they could not evaluate the evidence objectively, (2) the government's case was not weak, and (3) the statements were minor aberrations in a long trial and were not so continual as to create a forum dominated by prejudice and passion. This isolated comment when viewed in its context and when judged by the standards of this Court can-

not be found to have arisen to prejudice, and this Court should refuse to review this issue on the grounds claimed by petitioner.

CONCLUSION

Respondent submits that upon the foregoing arguments this Court should refuse to grant the petitioner's Writ of Certiorari.

Respectfully submitted,

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